

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GROTTO D'ORO BAY CORP.</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 817903</b>
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law, for Redetermination of Deficiencies or for Refund	:	
of Personal Income Tax under Article 22 of the Tax Law	:	
and for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1993 through December	:	
15, 1997.	:	

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Petitioner, Grotto D'Oro Bay Corp., c/o Joseph Faga, 1718 East 36<sup>th</sup> Street, Brooklyn, New York 11234, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under 9-A of the Tax Law, for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1993 through December 15, 1997.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 17, 2001 at 10:30 A.M., with all briefs to be submitted by May 23, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by its officer Joseph

Faga. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert Maslyn, Esq., of counsel, at hearing; Michael P. McKinley, Esq., of counsel, on the brief).

### ***ISSUES***

- I. Whether the Division of Taxation's motion to dismiss the petition, based on the ground that it was not filed in a timely manner, should be granted.
- II. If it is determined that the Division of Tax Appeals has jurisdiction over this matter, whether the Division of Taxation has shown that its audit methodology was reasonable.
- III. Whether the notices and demands petitioned in this matter should be sustained.
- IV. Whether penalties in this matter should be upheld.

### ***FINDINGS OF FACT***

1. The Division of Taxation ("Division") issued to petitioner, Grotto D'Oro Bay Corp., a Notice of Determination dated June 12, 1998, identified by Assessment ID No. L-015104218-7. Such notice asserted additional sales and use taxes due and owing by petitioner for the period December 1, 1993 through December 15, 1997, in the amount of \$334,328.00, plus interest and penalty in the amounts of \$99,212.05 and \$88,635.93, respectively, for a total of \$522,175.98.

The Notice of Determination was addressed to petitioner, c/o Gregory Messer Trustee, 423 Fulton St., Brooklyn, New York 11201. The notice indicated that it was based on an audit and states that it might be challenged by filing a request for a conciliation conference or petition for a tax appeals hearing by September 10, 1998. The notice indicated it would become an assessment subject to collection action if a response was not received from petitioner by September 10, 1998.

2. On November 22, 1999, petitioner filed a petition with the Division of Tax Appeals, seeking redetermination of all the assessments set forth on a Consolidated Statement of

Liabilities, dated November 23, 1998, which included the Notice of Determination described in Finding of Fact “1” and eight assessments based on no remit or partial remit returns filed by petitioner. The first nine assessments listed consist of liabilities which the statement indicated are subject to collection action and the accrual of additional penalty and interest, as follows:

Tax Type	Assessment ID	Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/ Credits	Current Balance Due
Withld	L-011135107-7	6/30/95	\$ 1,525.50	\$ 616.48	\$ 393.59	0	\$ 2,535.57
Sales	L-011617008-5	8/31/95	15,141.22	4,158.93	4,169.97	12,790.49	10,679.63
Withld	L-011536298-7	9/30/95	1,500.00	532.23	295.64	0	2,327.87
Sales	L-011868543-4	11/30/95	10,978.44	4,884.38	3,403.92	0	19,266.74
Withld	L-011814644-8	12/31/95	1,792.91	563.87	320.85	0	2,677.63
Sales	L-012343519-3	2/29/96	7,036.18	2,816.71	2,170.81	0	12,023.70
Withld	L-012956658-2	3/31/96	775.94	218.33	127.71	0	1,121.98
Sales	L-013169474-4	8/31/96	7,228.65	2,266.35	2,230.99	614.00	11,111.99
Sales	L-015104218-7	12/15/97	334,328.00	123,970.61	96,598.80	0	554,897.41
Total							<b>\$616,642.52</b>

The remaining five liabilities on the statement were generated as a result of returns or reports not filed for the periods listed, where the Division estimated the amounts due. During the hearing, however, the Division stated that it conceded these liabilities and would not pursue their collection. The liabilities referred to are as follows:

Tax Type	Assessment ID	Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/ Credits	Current Balance Due
Sales	L-012786249-7	5/31/96	\$ 7,168.62	\$ 2,484.69	\$ 2,150.48	0	\$ 11,803.79
Corp	L-013936500-8	6/30/96	1,000.00	239.20	250.00	0	1,489.20

Sales	L-013911854-9	2/28/97	14,337.24	3,390.36	4,372.81	0	22,100.91
Sales	L-014203340-4	5/31/97	21,505.86	4,515.05	6,093.19	0	32,114.10
Sales	L-014612425-8	8/31/97	21,505.86	3,659.93	5,376.36	0	30,542.15
Total							<b>\$98,050.15</b>

3. The Division's answer, filed on or about August 31, 2000, responded in part that it commenced an audit of petitioner's business, requested records as required by law, failed to receive books and records or received inadequate books and records, estimated sales and use taxes due, and issued Notice of Determination L-015104218-7. In addition, the Division maintained that the petition filed herein was untimely.

4. The Division commenced an audit of petitioner's business and made its first of several requests for books and records in October 1996. No books and records relating to petitioner's sales transactions were ever produced by petitioner. Having obtained a sales contract for the sale of two-thirds of the business in August 1995, the Division estimated annual sales for the audit period by referring to a ratio from the Robert Morris Annual Statement Study. From annual estimated sales, the auditor computed estimated sales per quarter and sales tax due per quarter. This audit was the basis for Assessment No. L-015104218-7 and the Notice of Determination dated June 12, 1998 (*see*, Finding of Fact "1").

5. Consents extending the period of limitation within which an assessment could be made were executed by petitioner, the latest of which was dated August 12, 1997 and extended the period of limitations on assessment of sales and use taxes for the period December 1, 1993 through September 30, 1995 until November 20, 1998.

6. On June 30, 1997, petitioner filed for Chapter 7 protection with the United States Bankruptcy Court in the Eastern District of New York. On October 23, 1998, the Bankruptcy Court dismissed the petition in bankruptcy.

7. The Division filed a Motion to Dismiss the petition pursuant to 20 NYCRR 3000.9(a)(1)(ii) on November 22, 1999, on the ground that it was untimely as filed, and thus, precluded the Division of Tax Appeals from having subject matter jurisdiction over matters addressed therein.

8. The Division submitted as part of the current record in this matter, the documents from a Motion for Summary Determination involving the same petitioner in a former case (DTA #816776) and the same Notice of Determination at issue herein. The motion included the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notices of deficiency and determination, and describe how such procedures were followed in this case.

9. The general process for issuing and mailing notices of deficiency and determination begins with the CARTS Control Unit's receipt of a computer printout entitled "Assessments Receivable, Certified Record for Non-Presort Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding statutory notices generated by CARTS.

10. The CMR is printed approximately ten days prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed, in this case by personnel in the Division's Mail Processing Center, to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

11. A Division employee places each notice in an envelope. Statutory notices ready for mailing are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, and a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Then a mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. The employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate that was the number of pieces received.

12. The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

13. In support of its position that the procedures outlined in Findings of Fact “9” through “12”, were followed in this case, the Division has also submitted a copy of the CMR listing the notice at issue in this matter. The CMR consists of 8 pages with 11 entries on each page, with the exception of page 8 which bears 1 entry. It shows a printed date of “6/3/98” on each of the pages number 2 through 8.<sup>1</sup> On page one the printed date has numerous lines through it and above it is handwritten the date of “6-12-98.” There is a consecutive listing of 78 certified control numbers beginning with P 911 206 276 and ending with P 911 206 353. On the last page next to “TOTAL PIECES AND AMOUNTS LISTED” appears the printed number 78, which is circled. There is no amount next to “TOTAL PIECES RECEIVED AT POST OFFICE.” There is a USPS postmark of June 12, 1998 on each of the 8 pages and initials under the number “78.”

Petitioner’s name is listed on page 3 of the CMR. The certified number listed for the notice sent to petitioner is P 911 206 304, which matches the certified number shown at the top

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<sup>1</sup> Although it is presumed that the same date “06/03/98” appears as well on page 1 of the CMR, the manner in which the date was crossed out makes it impossible to read the date.

of the correspondence which accompanied petitioner's notice of determination. The notice number listed on the CMR for petitioner's notice is L 015104218, which matches the number appearing on the notice of determination. The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notice. There is a USPS postmark of June 12, 1998 on page 3 of the CMR.

### ***SUMMARY OF THE PARTIES' POSITIONS***

14. Petitioner maintains that Joseph Faga has standing as an officer of petitioner to bring the instant petition. As a result, petitioner contends that it was error for the Administrative Law Judge in a previous decision to order him to file a corrected petition. Petitioner also argues that the Division's motion to dismiss should be denied because the Division did not provide estimates or an accurate accounting to ascertain the alleged tax deficiencies.

15. The Division argues that its motion to dismiss should be granted since petitioner did not file a timely petition and thus, the Division of Tax Appeals does not have jurisdiction over this matter. If it is determined that jurisdiction to hear the merits of the case exists, the Division contends that its audit methodology was reasonable in light of petitioner's failure to produce adequate books and records. The Division further maintains that all of the notices and demands that are petitioned should be sustained. Lastly, the Division believes all penalties imposed should be upheld.

### ***CONCLUSIONS OF LAW***

A. Petitioner argues that Joseph Faga has standing as an officer to bring the petition in issue. Petitioner has correctly assessed his status as officer and a determination upholding



Joseph Faga's standing was confirmed by the Tax Appeals Tribunal (*Matter of Grotto D'Oro Bay Corp.*, Tax Appeals Tribunal, June 29, 2000). Petitioner next maintains that because Joseph Faga has standing, it was error for the Administrative Law Judge in a previous decision to order him to file a corrected petition. Petitioner is referring to the determination in *Matter of Grotto D'Oro Bay Corp.* (Division of Tax Appeals, September 16, 1999), where the original petition filed in that matter (challenging the same notice of determination at issue herein) was determined to be invalid because it was signed by Ben Faga, who could not legally represent the corporate petitioner, leaving the Division of Tax Appeals without jurisdiction over the matter. Petitioner was then provided with an opportunity to file a corrected petition signed by Joseph Faga, who was determined to be a person having the authority to sign the petition on behalf of Grotto D'Oro Bay (*id.*). The corrected petition was due within 30 days of the order, or by October 18, 1999. When no corrected petition was filed, the Administrative Law Judge dismissed the matter (*Matter of Grotto D'Oro Bay Corp.*, Division of Tax Appeals, November 12, 1999), which determination was sustained by the Tax Appeals Tribunal (*Matter of Grotto D'Oro Bay Corp.*, Tax Appeals Tribunal, June 29, 2000). Since petitioner's argument has already been addressed and decided by the Tax Appeals Tribunal, it will not be further addressed herein.

B. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1), as in effect during the period in issue, such determination "shall finally and irrevocably fix the tax" or "shall be an assessment of the amount of tax specified in such notice" unless the person against whom it is

assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice.<sup>2</sup> As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*) However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division. The Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal,

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<sup>2</sup> Section 1138(a)(1), as amended by Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due, and replaced it with a provision that the notice becomes an assessment of the amount of tax so specified. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997, as specified in section 3 of Laws of 1996 (ch 267). The amendment may not be given retroactive effect (*see*, McKinney’s Cons Law of NY, Book 1, Statutes § 51[b]). Since the assessments in this case pertain to the time period December 1, 1993 to December 15, 1997, the amendment to Tax Law § 1138(a)(1) applies to those periods which fall after January 1, 1997.

November 25, 1992). Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz, supra*).

The required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and Mr. Baisley in support of its position that the notice of determination was issued to petitioner on June 12, 1998, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such notice (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notices were issued, the assessment number of the notices and the certified control number assigned to the notices.

The Division established that the general issuance procedure was followed on June 12, 1998, in the generation and mailing of petitioner’s notices dated that day. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as June 12, 1998 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). The CMR used by the Division contains most of the significant elements of Postal Service Form 3877 and serves the same purpose of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who

personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient.

Finally, it is noted that the figure "78" on the last page of the June 12, 1998 CMR, signifying the total number of pieces of mail involved, has been circled and a Postal Service employee has signed in the vicinity of the figure. As in *Matter of Roland (supra)*, the postal employee circled this figure to indicate the number of pieces of mail received by the USPS on June 12, 1998. In addition, and unlike the situation in *Roland*, the affiant, Mr. Baisley, states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has established that the notice of determination was mailed on June 12, 1998.

D. Petitioner does not challenge the method of mailing of the Notice of Determination, nor does it dispute receipt thereof. There is no challenge to the address used on the Notice of Determination which was sent in care of petitioner's bankruptcy trustee.

Accordingly, under the statutory provisions set forth above, petitioner was required to file its request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of June 12, 1998, or no later than September 10, 1998. In this case, petitioner could have filed a corrected petition until October 18, 1999, but failed to act. Since the petition was not filed until November 22, 1999, it is time barred. Lacking a timely petition, the Division of Tax Appeals has no jurisdiction over this matter (Tax Law § 2008; 20 NYCRR

3000.3; *Matter of Levin*, Tax Appeals Tribunal, April 16, 1998, *dismissed for lack of personal jurisdiction* App Div 3d Dept, October 20, 1998, Case No. 82927, *lv denied* 92 NY2d 819, 685 NYS2d 421).

E. The Division issued notices and demands to petitioner for late filed, non-remit or partial remit sales and withholding tax returns covering periods from April 1, 1995 through August 31, 1996 (*see*, Finding of Fact “2”). Regarding the notices and demands represented by the first eight notices set forth in Finding of Fact “2,” the tax was self-assessed by petitioner when the company filed its returns, i.e., the amount of tax due and owing was determined by petitioner, not the Division (Tax Law §§ 1133, 1138). When a taxpayer files a return, the taxpayer, because he has self-assessed the tax by the filing, must prove its correctness (*cf.*, *Abatti and Gruis v. Commissioner of Internal Revenue*, 37 TCM [CCH] 1597, *reversed and remanded on other grounds* 644 F2d 1385, 48 AFTR2d 81-5020). Likewise, if after the self-assessment has been made, petitioner does not believe the tax to be due and owing, petitioner must carry his burden of proof as to the difference (20 NYCRR 3000.15[d][5]).

Petitioner appropriately exercised its right to petition the notices and demands (*see*, *Matter of Meyers v. Tax Appeals Tribunal*, 201 AD2d 185, 615 NYS2d 90, *lv denied* 84 NY2d 810, 621 NYS2d 519). There is no statutory authority governing issuance of notices and demands. Accordingly, the Division is not required to prove its mailing as it must with statutory notices, such as the Notice of Determination in this case. However, petitioner’s protest does require the taxpayer to carry the burden of proving why it should not have to pay the notices and demands (20 NYCRR 3000.15[d][5]). Since petitioner provided no explanation

as to why it should not have to pay the notices and demands, petitioner does not prevail in its challenge of these notices.

F. Petitioner's final argument that the motion to dismiss should be denied because the Division did not provide estimates or an accurate accounting to ascertain the alleged tax deficiencies, is not a basis for dismissal, but rather addresses the merits of the audit and the resulting notice of determination, which cannot be reached without jurisdiction.

G. Inasmuch as the audit of petitioner resulted in Notice of Determination L-015104218-7, over which the Division of Tax Appeals has no jurisdiction, this determination will not address any other challenges to the merits of the audit.

H. The penalties imposed are for late filed returns, late or nonpayment of taxes and for substantial underreporting and underpayment of sales and use taxes (Tax Law § 1145). If petitioner was able to show that its failures were due to reasonable cause and not willful neglect, the penalties are subject to abatement. However, in this case, petitioner has provided no basis for abatement of such penalties. Accordingly, the penalties are sustained.

I. The petition of Grotto D'Oro Corp. is dismissed with respect to the Notice of Determination dated June 12, 1998 and except as set forth in Finding of Fact "2," and the petition is denied with respect to the notices and demands for Assessment Nos. L-011135107-7, L-011617008-5, L-011536298-7, L-011868543-4, L-011814644-8, L-012343519-3, L-012956658-2 and L-013169474-4 which are sustained.

DATED: Troy, New York  
November 8, 2001

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE